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IN THE

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Supreme Court of the United States

October Term, 1949

No. 248

JOHN HOWARD LAWSON

vs.

THE UNITED STATES OF AMERICA

No. 249

DALTON TRUMBO

vs.

THE UNITED STATES OF AMERICA

No. 766

EDWARD K. BARSKY, ET AL

vs.

THE UNITED STATES OF AMERICA

No. 197

GEORGE MARSHALL

vs.

THE UNITED STATES OF AMERICA

No. 236

RICHARD MORFORD

vs.

THE UNITED STATES OF AMERICA

No. 49

HELEN PARKER, ET AL,

vs.

COUNTY OF LOS ANGELES, ET AL

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, The National Council of the Arts, Sciences and Professions, prays leave of this Court to file this Brief Amicus Curiae in the above-entitled case.

Petitioner organization deems it imperative in the interest of the preservation of liberty and democracy in the nation that this Court grant certiorari in the cases here and resolve the grave questions of constitutional law presented, particularly those touching freedom of speech, press, thought, association and assembly. Petitioner organization is deeply and vitally interested in those issues of law and the preservation of those liberties.

The National Council of the Arts, Sciences and Professions is an organization composed of artists, writers, musicians, actors, scientists, teachers, lawyers, doctors, architects and other American professionals. The National Council of the Arts, Sciences and Professions is committed to a program of peaceful development of the world's resources for the greater happiness of all mankind regardless of race, religion or political beliefs. Believing that the issues involved in the present case vitally affect the realization of that program and the welfare of all Americans, it respectfully requests leave to file the following brief amicus curiae.

In form, these cases concern no more than the individual fate of outstanding figures in American cultural and professional life. In substance, however, they involve the very fabric of our constitutional democracy.

The essential design of that fabric is the principle of popular sovereignty, of government only by the consent of the gov-

erned. Its warp and woof is the doctrine that the will of the people themselves is primary to the aims and policies of any group of public officials. And the realization of that principle, the implementation of the primacy of popular will over governmental authority, depends upon the impotence of such authority to mold that will. "Authority here," said Mr. Justice Jackson (writing for this Court in *Board of Education v. Barnette*, 319 U.S. 624, 641) "is to be controlled by public opinion, not public opinion by authority."

Public opinion, popular will, is determined by what people hear, read and see, by the manner in which they interpret their own experiences and what they can learn of the experiences of others, by the interchange of ideas, by analysis, argument and agitation. Were the government empowered to affect the course of that determination—by granting official favor to one set of ideas, as against another, by obstructing the expression of one point of view and facilitating the expression of others, by harassing and suppressing those with whom it disagreed—it could in essence fix the ultimate determination itself. Given the power to influence and direct thought and expression, government could reverse the maxim enunciated by Justice Jackson, could control public opinion instead of being controlled by it, could endow itself with the substance of despotic power. For then would the wielders of governmental authority be responsible in fact to themselves alone; by enslaving the popular will, they could usurp the popular sovereignty, and become, not the servants but the masters of the people.

Those who fought a bitter, bloody struggle to gain their freedom and independence sought a safeguard against making such a mockery of their sacrifice. They were wary of the temptations of governmental power. They were determined to prevent so easy a subversion of the democratic institutions they were establishing in the Constitution. Accordingly, they insisted upon the incorporation in that document of a specific prohibition against the invasion by government of the area of thought and expression. They sought, by the agency of the First Amendment, to guarantee the inviolability of the mind and will

of every person against governmental intervention in any form.

The First Amendment is thus the very foundation of our republican form of government. It is the "matrix, the indispensable condition" of all other liberties, of every institution of our democracy.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*Board of Education v. Barnette*, supra at p. 642.)

But the present cases confront us with nothing less than an effort to eclipse that star. Here we have a statute which purports by its terms to endow a group of public officials—a Committee of Congress—with the power to prescribe what shall be orthodox in matters of public and private life and opinion. Here we have the spectacle of a group of public officials acting under that statute proclaiming its peculiar definitions of heresy in economic, social and political doctrine, bestowing its favor upon the individuals and groups which meet its standards of propriety, thundering its condemnation of those with whom it disagrees, and requiring citizens either to avow the orthodoxy or to confess the heresy the Committee has defined.

To be sure the statute and its creature do not use the terms "orthodoxy" or "heresy"; their characterizations are framed in terms of "loyal" and "subversive," "American" and "Un-American." They do not refer to "social, political and economic doctrine"; the term "propaganda" serves as a substitute. But the meaning and the content is the same. What we have is a group of officials who presume to announce what is right or wrong, acceptable or unacceptable, for Americans to think and write and say. With Congressional approval, they have set themselves up as the definitive interpreters of good and bad American thought. They have assumed the prerogative of applying the seal of official approval to the tenets of certain indi-

viduals and groups, and to brand others with the stigma of "subversive." Is this not the official prescription of "orthodoxy"? Surely, the one fixed star in our constitutional constellation does not fade before an artful epithet.

Upon what basis can such a body, acting in such flagrant violation of the constitutional precepts announced by this Court be permitted to exist? This Court has said that "no official, high or petty can *prescribe* what shall be orthodox." (Emphasis added). Congress may not punish heresy or "Un-Americanism," for the simple reason that it lacks the power to prescribe that which is sought to be punished. It is the prescription to which this Court referred, and the lack of power to punish is but a corollary to the lack of power to prescribe.

Moreover, the First Amendment provides broadly that Congress shall make *no law abridging* freedom of thought or expression. It does not confine its prescription to abridgments enforced by fine or imprisonment or injunction. It does not wilt in the face of other repressive devices. This Court has said many times that the Constitution was designed to keep abreast of the times with due regard to the incursions of despotism.

And in our time, the most devastating of such incursions was accomplished to a large extent by the very technique with which we are concerned. In the Nazi system of repression, the Ministry of Information and Propaganda under Herr Goebbels had a peculiar and vital place. Its function was not to punish. It confined itself to declaring publicly what was "Aryan" or "Un-Aryan," good or bad for a German to say, to read, to see. It defined those writings and speeches and persons and organizations which were acceptable to government and those which were taboo. And it relied upon other public and private agencies to impose the sanctions for its "informational" edicts. Those whom it condemned could expect to be discharged from their jobs, ostracized from social intercourse, subjected to humiliation and violent assault, to prosecution for any conceivable technical offenses. But the Ministry itself was in the clear—its function was simply to "expose" and to "inform."

Is that not precisely the function of the Committee with which we are here concerned? It too publishes its taboos and relies on other agencies for the imposition of sanctions. Those whom it finds objectionable are publicly vilified, slandered and harassed. Individuals who associate themselves with persons or organizations characterized by the Committee as "Un-American" become the objects of suspicion, of official and unofficial investigation, find themselves deprived of the opportunity for public and private employment, hindered in the pursuit of every normal channel for the fulfillment of their lives. It is indeed the aim of the Committee to destroy organizations with whose purposes the Committee disagrees, (such as the undersigned in whose behalf this brief is filed) by making persons fearful of participating in its efforts.

But the effect of the Committee's acts is nowhere more vividly portrayed than in the very facts of the instant cases. Here are individuals who are among the foremost American artists and professionals, with records of a magnificent contribution to our national cultural and professional life, who have been deprived of their jobs, blacklisted, denied the opportunity to work in the arts and professions in which they have demonstrated so extraordinary a genius. Is this not "abridgment" of free thought and expression? Is this not punishment in its cruelest form—all the more unconscionable because it has been administered without any of the safeguards of due process which must, under our system of justice, attend the official deprivation of liberty or property.

But beyond this, these defendants have in fact been sentenced to fine and imprisonment. It is that sentence which this Court is asked to review. And it flows directly from the exercise by the Committee of the powers prohibited to it by the Constitution. These defendants were tried and convicted because they refused to submit to coercive inquisition into their personal and organizational beliefs and political associations. Their conviction, therefore, rests squarely upon the Committee's invasion of the area of free thought and expression. It is based entirely upon the Committee's action in setting standards of orthodox

political thought and association and presuming to determine whether particular individuals meet the standard thus declared.

There is no room for subtlety here. Stripped of nice technicalities, we are presented with a crude effort on the part of an agency of government to cast public opinion in the narrow mold that agency has itself prepared. We are faced with the exercise by a group of public officials of a prerogative never before assumed in our entire history—that of formulating for every American standards of thought and expression and association, and of compelling conformity to those standards under pain of penalties. We are confronted by a group of men who propose to foist upon us an iron-clad censorship of every organ of cultural and political expression. We are faced with the persecution of individuals who courageously challenge the power of any official to compel their acceptance of these standards of thought, who refused to submit to an inquisition in those spheres wherein the Constitution grants them immunity from government intrusion.

The action taken against the defendants herein carries with it a grave threat to the foundations of democracy. Like oaks from acorns, fuehrers from petty tyrants grow. We cannot compromise with despotism; it must be resisted wherever it dares to appear.

If our constitutional liberties are to retain the life and vitality with which they were originally invested, these monstrous convictions must be set aside.

Coupled with the foregoing, the decision of the Lower Court in the case of *Parker et al v. County of Los Angeles* must be reversed for the following reasons. The test oath has long been recognized as the heart of the inquisitorial process and the Constitution has made provision to eliminate this evil. *U.S. Const., Art. VI.*

Whether of religious or political nature, the test oath has been the weapon of tyranny wherever it existed and the antithesis of due process, and has been stricken down by the Supreme Court in all its ramifications. The test oath, prescribed by the Courts of the Inquisition and Star Chamber, was never

intended to be incorporated into our judicial or administrative systems, and, until recent years, was not utilized by any agency of government.

It is easy to understand the natural repugnance these methods call forth. When the test oath is employed, the presumption of innocence vanishes and the privilege against self-incrimination becomes a double-edged sword held over the head of the defenseless witness or employee. Our system is accusatorial rather than inquisitorial in nature, and the Supreme Court has held that the inquisitorial process substitutes "for the established mode of investigating . . . one that is unknown to the Constitution and repugnant to the genius of our law." *Cummings v. Missouri*, 71 U.S. 277, 322.

LESTER M. LEVIN
Counsel

Service of the within and receipt of a copy thereof is hereby admitted this.....day of....., A. D. 1949.